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SUPREME COURT OF THE STATE OF NEW YORK
I.A.S. PART 9 SUFFOLK COUNTY

INDEX NO.: 21193-12

PRESENT:
HON. DANIEL MARTIN

Motion Date: 07/31/12
Submitted: 08/21/12
Motion Sequence No.: 02 - **MD**

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Application of ROBERT DEL COL and TED DOUKAS,

Petitioners,

For a Judgement pursuant to Article 78 of the CPLR

-against-

HON. KATHLEEN RICE, as the duly elected District Attorney of Nassau County, and THE NASSAU COUNTY DISTRICT ATTORNEY'S OFFICE,

Respondents.

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PETITIONERS' ATTYS:
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Smithtown, NY 11787

John G. Poli, III, Esq.
P.O. Box 59
Northport, NY 11768

RESPONDENTS' ATTY:
Andrew J. Weiss
Assistant District Attorney
Nassau County District Attorney's Office
272 Old Country Road
Mineola, NY 11501

The following named papers have been read on this motion:

Notice of Motion/Order to Show Cause	X
Cross-Motion	
Answering Affidavits	X
Replying Affidavits	X

This is a petition for CPLR article 78 relief in the form of a writ of prohibition, prohibiting the respondents from convening a Grand Jury, going forward with a threatened Grand Jury proceeding or resubmitting a certain previously presented matter, all with respect to the facts and circumstances the presentation of which resulted in the indictment of petitioners under Nassau County indictment number 313N-10. Should prohibition not be available, the petition also seeks to disqualify the respondents from participating in the prosecution of any crime concerning those events by reason of a perceived conflict of interest.

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The petition before this Court arises in the wake of the dismissal of the referenced indictment returned in Nassau County upon a grand jury presentation by the Office of the Nassau County District Attorney Kathleen Rice. Both the "Office" and Kathleen Rice are respondents here. The petitioners are the named defendants under the indictment which charged one count of grand larceny in the second degree under Penal Law 155.40(1). Following arraignment, each petitioner, as defendant, submitted an omnibus motion before the Nassau County Court, the Honorable Meryl J. Berkowitz, A.J.S.C., presiding. In their motions the defendants moved to dismiss the indictment on the ground that, among other things, the District Attorney lacked the authority to appoint the prosecutor who presented the subject charges to the grand jury.

Justice Berkowitz decided defendants' motion by an order dated October 22, 2010, which was entered on October 26, 2010, finding that the District Attorney indeed lacked the authority to appoint the prosecutor who presented the subject charges to the grand jury. The decretal paragraph of that order provides:

> Accordingly, the motion to dismiss the indictment of Robert Del Col and Ted Doukas is granted. CPL 210.35 (5) and CPL 190.25 (3). Leave is granted to represent this matter to a new Grand Jury within 45 days of the date of this order. CPL 190.25 (3). People v. Maye 173 A.D.2d 891 (3rd Dept 1991). This determination shall constitute the decision and order of the Court.

On appeal by the People, the Appellate Division, Second Department, on October 4, 2011, affirmed the Order of Justice Berkowitz. *People v DelCol*, 88 AD3d 737 (2nd Dept, 2011). Thereafter, the People sought leave of the Court of Appeals to appeal the Order of the Appellate Division, which application was denied by Order dated March 30, 2012.

Between the orders of the Appellate Division and the Court of Appeals, on October 21, 2011, the petitioners here filed a civil action against respondents here, and others, in the United States District Court for the Eastern District of New York. The action is presented as a 42 U.S.C. 1983 and 1985 claim for damages for, inter alia, an illegal "*pay to prosecute scheme/conspiracy.*" (Emphasis as in the complaint CV 11 5138).

The petition presents three proffered grounds for relief in the form of a writ of prohibition against further presentment of the underlying criminal prosecution: that their right to a speedy trial, pursuant to CPL 30.30 and the Sixth Amendment to the United States Constitution would be violated; that such a prosecution would be beyond the geographic jurisdiction of the Nassau County District Attorney; and, that re-presentment of the matters underlying the indictment previously dismissed by Order of Justice Berkowitz would violate the mandate of CPL 190.75 (3) that when an indicted charge has been dismissed it may not again be submitted to a grand jury unless authorized by the Court in its discretion, and since Justice Berkowitz's discretion was granted on a conditional basis, and the condition not having been met, re-presentment is barred. The petition also calls for an order disqualifying respondents from the further investigation and prosecution of the petitioners by reason of the conflict allegedly inherent from their status as defendants in the referenced civil action.

The Order to Show Cause which initiated this proceeding contained a stay restraining respondents from further prosecutorial actions in regard to the petitioners on the underlying criminal matter. That stay has remained in effect pending this Court's order.

WRITS OF PROHIBITION

The Court of Appeals has often specified the considerations to be made with regard to the appropriateness of relief by Writ of Prohibition. Most recently the Court, in *Matter of Soares v. Herrick* _- - N.E.2d - - -, 2012 WL 5906690 (N.Y.), 2012 N.Y. provided this summary:

> "It is familiar law that an article 78 proceeding in the nature of prohibition will not lie to correct procedural or substantive errors of law" (*Matter of Schumer, v. Holtzman,* 60 N.Y.2d 46, 51[1983], citing *Matter of Morgenthau v. Erlbaum,* 59 N.Y.2d 143,147 [1983]). Rather, the extraordinary remedy
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> > "of prohibition may be obtained only when a clear legal right of a petitioner is threatened by a body or officer acting in a judicial or quasi-judicial capacity 'without jurisdiction in a matter over which it has no power over the subject matter or where it exceeds its authorized powers in a proceeding of which it has jurisdiction'" (*Matter of Morgenthau,* 59 N.Y.2d at 147, 464 N.Y.S.2d 392, 451 N.E.2d 150, quoting *Matter of Dondi*, 40 N.Y.2d 13, 386 N.Y.S.2d 4, 351 N.E.2d 650).

The initial question here is whether the remedy of prohibition under CPLR article 78 is available to petitioners to assert a right to bar further prosecution. In the rubric of this Court's decision these principles are applied to petitioners' proffered grounds as noted above.

PETITIONERS' 45 DAY CLAIM

Petitioners claim a clear legal right to the benefit of the law of the State of New York, as it is codified in the Criminal Procedure Law at §195.75(3), which, generally, provides that when a grand jury charge has been dismissed, it may not again be submitted to a grand jury unless the court in its discretion authorizes or directs the prosecution to resubmit the charge to the same or another grand jury. By virtue of Justice Berkowitz's Order, *supra*, the discretion to resubmit the matter was conditioned upon resubmission being accomplished within 45 days of the date of the Court's Order of October 22, 2010.

Petitioners conclude that more than 45 days have expired since the Order of October 22, 2010, and therefore the respondents' leave to re-present has lost its effect.[1] Thereby, the mandate

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[1]This Court calculates that 103 days during which no stay was in effect have elapsed, omitting from consideration the following periods when the matter was stayed: from October 22, 2010, through the Appellate Division Order of October 4, 2011, (CPL 460.40(2)); and, thereupon through April 2, 2012, the effective date of the Court of Appeals Order denial of leave to appeal.(CPLR 5519(a)(1)). As noted above, the Order to Show Cause which commenced this proceeding on July 16, 2012, contained a stay which remains in effect.

of CPL 195.75(3) that the charge may not again be submitted, protects petitioners from further prosecution on the facts and circumstances underlying the dismissed indictment.

The import of the petition is that, were the respondents to proceed to re-present the matter, they would be acting in excess of their authority and threatening a clear legal right of the petitioners. The act of prosecuting the petitioners would be an act in excess of power rather than a mere error of law, and prohibition would be an available remedy. In this way respondents are divested of jurisdiction to proceed since CPL 190.75 precludes re-presentment.

In assessing petitioners "clear right" to prohibitive relief in this special proceeding, it is necessary for this Court of ascertain the law of the criminal case from which the instant controversy arises. In that regard, to the extent that petitioners rely on the County Court's dismissal order, the Appellate Division's order is the final say (leave to appeal having been denied by Court of Appeals). It is the law of the criminal case. *People v. Evans*, 94 N.Y.2d 499, (2000).

The consequence to the instant matter is that Justice Berkowitz's Order is entitled to full force and effect upon the appellate court's holding that "Ordered that the order is affirmed,"[2] no modification of the lower court's order having been provided.

Applying the calendar to the restrictions as affirmed by the Appellate Division, it is evident that respondents' time to re-present the criminal matter to a grand jury has expired, more than twice the allotted time having elapsed.

Respondents argue that Justice Berkowitz's order restricting the time-frame for re-presentment "runs counter to applicable law and is, therefore, not enforceable." They cite CPL 210.20(4), for the proposition that a court has discretion to authorize the People to resubmit but insist that the *discretion* afforded to the court is only whether a matter may be resubmitted to the same or another grand jury, so that a court may not exercise the further discretion of setting a time frame. They also cite anAppellate Division, Third Department case, *People v. Merighe*, 40 A.D.2d 223 (3rd Dept, 1972), to that effect and lower court cases where that tack was followed. The Court is not informed of any Second Department or Court of Appeals cases which support respondents' assertion that there is "well settled law" on this issue. Certainly none which would affect the law of this case. The Court in *Merhige* cites to no case law or statute other than the one it interpreted, i.e., CPL 210.20. This Court is mindful of the rule that it would be bound by the precedent set by a holding in another Department in the absence of Second Department precedent. The Court, however, finds that the Appellate Division decision in *People v. Del Col*, as cited herein, obviates that consideration.

The Court notes here that respondents were free to have addressed the Second Department in the appeal of the criminal case with the issue they present here. They did not. The Appellate Division was free to review any issue of law involving error or defect in the criminal court proceeding which may have adversely affected the appellants (respondents here). CPL 470.15 (1), *People v. Goodfriend*, 64 N.Y. 695 (1984). This Court cannot presume that the Appellate Division's

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[2] *People v. Del Col*, 88 AD3d 737, 738 (2nd Dept, 2011)

review of the subject case did not include all questions of law which may have adversely affected the appellant before it, including the alleged inappropriateness of the lower court's time restriction. Respondents might also have moved to reargue the original dismissal motion, moved for more time or even re-presented the matter within the 45 days allotted. Respondents have not availed themselves of any means to eliminate the 45 day time limit imposed by Justice Berkowitz and affirmed by the Appellate Division. In sum, the order of Justice Berkowitz, affirmed and unmodified by the Appellate Division, remains the law of the criminal case.

Thus, on this ground, petitioners have established a clear legal right to relief in the nature of prohibition. The Court must then also assess whether its discretion should be employed to grant the writ. *Matter of Morgenthau v. Erlbaum*, 59 N.Y.2d 143 (1983).

Prohibition is appropriate when, on presentation of a clear cut question of prosecutorial jurisdiction, there is no reason why a petitioner should have to await a possible conviction in order to vindicate his position. This is particularly so where, as here, one of the petitioners, Del Col, is an attorney who would be automatically disbarred upon conviction. *Matter of Dondi*, 40 N.Y.2d 8 (1976), (affirming the Appellate Division, Second Department.) There is now no criminal proceeding extant in which petitioners might move or appeal their rights to the protection afforded citizens by CPL 190.75. As the Court of Appeals noted in *Dondi*, at 9:

> Prohibition does not issue where the grievance can be redressed by ordinary proceedings at law or in equity, such as by appeal, motion or other ordinary applications, but, if the appeal, motion or other applications would be inadequate to prevent the harm and prohibition would furnish a more complete and efficacious remedy, it may be employed even though other methods of redress are technically available. (Citing *LaRocca v. Lane*, 37 N.Y.2d 575, 579-580).

The Court determines that its discretion is properly employed here to enter a writ of prohibition upon the petition, barring respondents from re-presenting to a grand jury the matters underlying Nassau County indictment number 313N-10, as previously dismissed by order of the Nassau County Court (Berkowitz, J.) dated October 22, 2010.

PETITIONERS' REMAINING CONTENTIONS

While complete relief is granted to petitioners by the above finding, consideration of the remaining grounds put forth by the petitioners is appropriate. The facts as alleged in the petition, as they pertain to respondents' alleged conflict of interest, are, if true, profoundly troubling. However, there is no factual determination before this Court which would enable an assessment of petitioners' various contentions with regard to any bias or conflict of interest on the part of respondents. The much anticipated decision of the Court of Appeals in the case of *Matter of Soares v. Herrick*, - - - N.E.2d - - -, 2012 WL 5906690 (N.Y.), 2012 N.Y. Slip Op. 08055, is instructive. That Court's decision provides that while courts, as a general rule, can remove a prosecutor, removal can only be made upon a finding of actual prejudice to the a defendant arising from a demonstrated conflict of interest or a substantial risk of an abuse of confidence, citing *Matter of Schumer*, 60 N.Y.2d 46 (1983). The claimed conflict in *Soares* was solely that there had been a civil action filed by the defendant there. That fact alone does not warrant the removal of the district attorney. There must be some evidence that the handling of the criminal case had an improper motive, or was the

product of malfeasance or bad faith, which the Court found lacking in the record.

There is no factual determination before this Court from which a decision, consistent with the parameters set forth by the Court of Appeals, in *Soares*, can be made. Such a finding would require a hearing and determination of the allegations, which action is obviated by the decision herein. Therefore, petitioners' demand for an order disqualifying respondents and appointing a special prosecutor is denied as moot. Any such finding would be academic as the holding of the Appellate Division and respondents' failure to re-present the matter within 45 days, foreclose further prosecution of the facts and circumstances surrounding that indictment.

Given the facts and circumstances as presented on the instant petition, it cannot be fairly said that petitioners have stated a constitutional speedy trial claim. Nor is their claim on this ground one which cannot be addressed in the context of any future criminal matter, should one effectuate. Therefore they would not be entitled to the issuance of a Writ of Prohibition on their ground of the Sixth Amendment speedy trial under CPL 30.30. *People v. Anderson*, 66 N.Y.2d 529 (1985). *Blake v. Hogan*, 25 N.Y.2d 747 (1969); *People v. Worley*, 201 A.D.2d 520; *Matter of Lopez v. Justices of the Supreme Court of New York County*, 36 N.Y.2d 949 (1975),

Lastly, there is again no factual determination on geographic jurisdiction before the Court upon which a Writ of Prohibition can be properly entered. Such a finding would come from consideration of the facts developed in the criminal case, which are not before this Court. *Matter of Steingut v. Gold*, 42 N.Y.2d 311 (1977), *People v. Isaacson* , 44 N.Y.2d 511. Therefore this ground would also fail as moot.

ORDERED that the petition is granted and a Writ of Prohibition prohibiting the respondents Kathleen Rice and the Nassau County District Attorney's Office from re-presenting to a grand jury the matters underlying Nassau County indictment number 313N-10, as previously dismissed by order of the Nassau County Court (Berkowitz, J.) dated October 22, 2010, shall issue.

ORDERED that the petition is denied in all other respects.

Submit judgment on notice.

Dated: January 4, 2013
Riverhead, NY

HON. DANIEL MARTIN, A.J.S.C.